charge may not be sustained.[13] The issue in the *Jenkins* case arises on the point of the *bona fide* nature of the charge. The State Department evidently regards the arrest as without probable cause, and dictated by malice. If that is so, there is no doubt of the duty of Mexico to release him and to pay an indemnity.[14] Jenkins' original refusal to give bail and his subsequent release on bail given by another does not weaken his case—though it might reduce the indemnity—if his allegations of fact are sustained. But the facts are disputed by Mexico. The case is purely a matter of law and unless other considerations dictate another policy, it would seem that arbitration should be resorted to. Unless the United States is absolutely certain of the facts, and even if it is, the policy of self-help involves consequences conducive neither to the peace of the world nor to the orderly development of international law. It is one of the defects of international law that self-help is admitted as a legal method for the redress of injuries, the plaintiff state constituting itself judge and sheriff. The political consequences of such measures, or course, cannot be predicted. Austria's insistence upon the privilege to resort to self-help in the redress of an alleged grievance against Servia brought about the World War.

E. M. B.

FREE SPEECH IN TIME OF PEACE

The question of freedom of speech under the Constitution comes again before the country with the notable decision in *Abrams v. United States* (1919) 40 Sup. Ct. 17. On this case, and on those of *Schenck, Frohwerk and Debs,*[1] further legal discussion of the restriction of speech must, in the main, be based.

Certain things are clear at the outset. There are principles at the base of our form of government on which all Americans can agree. The majority is to rule, and the minority is to obey. Correlative to this is the proposition that the minority shall have reasonable opportunity to object before laws are passed, and to turn itself, by peaceful conversion, into a majority if so be it can. Finally, the minority may properly be restricted to action that is peaceable and non-destructive; it is not to object nor to persuade by blackjack nor by sabotage. Commonplace though these propositions are, it is well to state them.

[13] Elihu Root in (1910) 4 AM. J. INT. LAW, 527. *Trumbull (Chile) v. United States,* Aug. 7, 1892, Moore's *Arb.* 3255, and the following cases before the United States-Mexican commission of July 4, 1868: Collier (*ibid.* 3244), *Atwood* (*ibid.* 3249), Cramer (*ibid.* 3250). See also *White (Gt. Brit.) v. Peru* (1864) *ibid.* 4967 and *"LaForte" (Gt. Brit.) v. Brazil* (1863) *ibid.* 4925.

[14] *Jonan (U. S.) v. Mexico,* July 4, 1868, Moore's *Arb.* 3251; *Pratt (Gt. Brit.) v. United States,* May 8, 1871, *ibid.* 3280; *Underhill (U. S.) v. Venezuela,* Feb. 17, 1903, Ralston 45, 51.

[1] (1919) 249 U. S. 47, 204, 211; 39 Sup. Ct. 247, 249, 252; all the opinions were by Justice Holmes.

During the war the matter of restriction on speech was much before our lower federal courts in the shape of prosecutions under the Espionage and Sedition Acts. These acts made criminal the advocacy or urging of certain classes of conduct, such as forcible resistance to a law of the United States;[2] also the publication of matter intended to cause insubordination in the fighting forces of the United States, or to obstruct the recruiting service.[3] Clearly we are dealing here with offenses involving criminal intent; clearly also, the validity of the enactments depends on their relation to the First Amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press." The acts were properly held constitutional. "The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils which Congress has a right to prevent."[4] "By the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech" that falls within the above description.[5] There is no cause to quarrel with this view of the law. As long as only such words are made punishable as produce or are intended to produce *a clear and imminent danger that they will bring about evils forthwith*—so long the principle of free speech is safe. In practice, now and again, free speech may nonetheless be penalized. Laws are administered by men. Men's feelings influence their judgments, as to the meanings of words, as to the imminence of danger. This is inevitable. But as long as the tests of constitutionality and of criminality are chosen carefully, in times of repose, and carefully laid down in the courts in times of stress, all has been done that can be done to safeguard liberty. The test laid down by Justice Holmes in the above passages is that of common-law incitement to crime. It is a sound test. The Constitution was never intended to privilege such incitement.[6]

But what constitutes criminal incitement, or urging, or advocacy? In the lower federal courts words were held criminal for "counselling evasion" of, e. g., the Selective Service Act.[7] The test of criminality

[2] Espionage Act, Title 12, sec. 3.

[3] *Ibid.*, Title 1, sec 3.

[4] *Schenck v. United States, supra.*

[5] Holmes, J. in *Abrams v. United States.*

[6] On this, and on the historical background of the First Amendment generally, see an article by Fred G. Hart, *Power of Government over Speech and Press*, to appear in the JOURNAL for February.

[7] *Fraina v. United States* (1918, C. C. A. 2d) 255 Fed. 28, 33, per Hough, J. No attempt is made in this comment to cite the authorities in the lower federal courts, nor to group or analyze them. They are exhaustively collected and digested by Thomas F. Carroll (1919) 17 MICH. L. REV. 621. The questions involved have also been examined by Professor Zechariah Chafee, Jr., with his usual power and lucidity in 17 NEW REPUBLIC, 66 (Nov. 16, 1918) and (1919) 32 HARV. L. REV. 932. The writer accords wholly with Professor Chafee's conclusions. See also G. Henderson, 21 NEW REPUBLIC 50 (Dec. 10, 1919).

which was upheld time and again was such *tendency* of the words used, in the circumstances in which they were used.[8] But tendencies may be remote or immediate. To state that two notorious persons who have just been convicted of conspiracy to induce persons not to register under the Conscription Act, "have made themselves elemental forces akin to the rocks and trees and rivers, ... the inference being that their greatness grows out of their offense, ... is equivalent to saying that their unlawful conduct is worthy to be followed."[9] And, to carry the thought to its conclusion, to say that their conduct is worthy of admiration is to urge others to imitate it, and is an offense within the act. In such a case the words are properly read with a view to the surroundings in which they were used; a possible, or even perhaps probable, tendency to encourage criminal resistance to the law is thus established; the necessary intent to encourage such resistance is inferred from the use by a reasonable man of such words in such circumstances; and the offense is made out. But no requirement is even hinted at, that *"only present danger of immediate evil or an intent to bring it about* can warrant Congress in setting a limit to the expression of opinion where private rights are not involved."[10] The difference is vital. It is somewhat hard to see how the most law-abiding citizen can agitate against a law to effect its repeal, without using words that have some possible tendency to induce violation of that law. And if such a tendency can be made criminal in time of war, it can be made criminal in time of peace. In the *law* in war-time and peace-time there is in this matter no difference. The difference is solely one of fact: words which when men's minds are at rest would have but a remote tendency to arouse them to violence, may in times of high tension produce an immediate danger of such violence. A jury, too, may in times of stress find in words an instant danger which in other times the same jury would not see. These are differences in fact and in administration; they do not militate against the validity of "immediate danger" as the only proper test of criminality of words. It is not, therefore, a cause for concern simply that convictions took place under the war measures which to-day appear to be miscarriages of justice. In part these have, now that conditions in men's minds are more nearly normal, been corrected on appeal.[11] In part they are of the sort which must always accompany the administration of justice by men: the accused failed to use his right to

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[8] The test of common-law incitement, ably contended for by Learned Hand, J., in *Masses Publishing Co. v. Patten* (1917, S. D. N. Y.) 244 Fed. 535, and *United States v. Scott Nearing* (1918, S. D. N. Y.) 252 Fed. 223, was, with or without intention, overruled and the test of tendency was upheld in *Masses Publishing Co. v. Patten* (1917, C. C. A. 2d) 246 Fed. 24, esp. at 38.

[9] *Ibid.*, 35.

[10] *Cf.* Holmes, J., in the *Abrams Case.*

[11] See (1919) 29 YALE LAW JOURNAL, 107.

appeal; or times were such that evidence told against him which normally the jury would have disregarded in large measure. But in another thing there is some cause for concern: that study of the reported cases leads to a decided belief that many of the convictions would not and could not have been obtained, if the court at the time of trial had had available, and had impressed upon the jury, the language of Justice Holmes in the *Schenck* and *Debs* and *Frohwerk Cases*.

Even so, if the criminality of speech because of its remote tendencies were to be limited to times of war, one might still look upon it with comparative equanimity. One is willing to endure silence, as he is to suffer taxes or the reek and mud of the field, that war may pass and victory be gained. When thousands go to their death it may be of little moment that some few go to prison. But we know, in normal times, that party feeling, too, runs high—and class feeling; that an unrestrained majority is prone to leave minorities but little elbow room. It is that elbow room that the First Amendment was intended to safeguard. In the *Abrams Case* Justice Holmes, restating and reinforcing his opinions in the prior cases, makes this fact plain indeed.

In that case the defendants had been convicted and sentenced to twenty years for "language intended to incite, provoke and encourage resistance to the United States" in the war with Germany; and for conspiring during that war "wilfully, by . . . writing and publication, to urge, incite and advocate curtailment of production of things [ordnance and ammunition] . . . essential to the prosecution of the war." To oppose participation by our country in the campaign against the Bolshevik government the accused had secretly prepared and attempted to distribute in New York City pamphlets couched in language exceedingly abusive of the President: these pamphlets urged, e. g., immediate general strike as the workers' means of letting capitalistic governments—including that of the United States—know that the workers "would not betray the splendid fighters of Russia." "In order to save the Russian Revolution we must keep the armies of the allied countries busy at home." The conviction was affirmed, Justice Clarke writing for the majority: "The plain purpose of this propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution in this country for the purpose of embarrassing and if possible defeating the military plans of the Government in Europe." On the interpretation of the facts of the case Justices Holmes and Brandeis differed from the majority.

The dissent may be shortly summarized:

"It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion when private rights are not involved. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms."

And to constitute a criminal attempt, under the act, to hinder the success of the government arms, Justice Holmes thought an actual intent to be necessary to hinder or cripple the United States in the prosecution of the war. He thought in the instant case that no such intent had been proved.

But the importance of his dissent does not lie in its interpretation of the facts. Let him be wrong on that; his opinion remains a landmark in the law. "Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper; I will add, even if what I think the necessary intent were shown; *the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow.*" And, as to constitutionality, the passage already quoted: "*It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion . . .*"

We need to know the limits of Congressional power in this matter. The Espionage and Sedition Acts have been found insufficient to curb radical agitation;[12] not only is their duration limited to the war, but they are war measures, and the offenses covered by them relate chiefly to hindrance of the successful prosecution of the war—although there is the section making criminal the "publication of any matter advocating or urging forcible resistance to any law of the United States."[13] The Attorney-General has submitted a bill to remedy these faults. That bill, in Section 1, makes criminal the commission, or attempt or threat to commit any act of force against any person or any property with intent to cause the change of the Government of the United States or any of the laws thereof, or to oppose or hinder the execution of any law of the United States; such an offense is "sedition," and punishable by fine and imprisonment up to twenty years.[14] And

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[12] See Attorney-General Palmer, as reported in the New York *Times* for Nov. 16, 1919, page 1.

[13] See *supra*, n. 2.

[14] "Section 1. Sedition. *Whoever, with the intent* to levy war against the United States, or *to cause the change,* overthrow, or destruction *of the Government, or of any of the laws or authority thereof,* or to cause the overthrow or destruction of all forms of law or organized Government, *or to oppose, prevent, hinder or delay the execution of any law of the United States,* or the free performance by the United States Government or any one of its officers, agents, or employes of its or his public duty, *commits, or attempts, or threatens to commit any act of force against any person or any property,* or any act of terrorism, hate, revenge, or injury against the person or property of any officer, agent, or employe of the United States, *shall be deemed guilty of sedition,* and, upon conviction thereof, shall be punished by a fine not exceeding $10,000 or by imprisonment for a period not exceeding twenty years, or by both such fine and imprisonment in the discretion of the court." The text is taken from the New York *Times,* Nov. 16, 1919, p. 21. The italics are the writer's.

to aid or abet the making or circulation of any word, argument, or teaching which advises, advocates, teaches or justifies any act of such sedition or any act which tends to incite such sedition, is, by Section 2, to be the crime of "promotion of sedition," and punishable by fine or imprisonment up to ten years.[15]

There is little exception to be taken to the first section. We do not want our laws changed by acts of force against person or property, nor by attempts at nor by threats of such acts; and to make such things criminal is a proper exercise of the legislative function.[16] But the second section is of another color. To begin with—surely through haste in its drafting—that section omits any intent clause: the *use of words is made a crime regardless of the intent with which they were used.* It is hardly conceivable that the bill will be enacted without the correction of such an error. And, in the second place, "promotion of sedition" may under this section be committed *by the use of words which justify an act which tends to incite sedition.* This would mean an incorporation into the statute, of *criminality solely for and because of tendency,* without regard to whether there was present danger of immediate evil. Justices Holmes and Brandeis believe such legislation to be unconstitutional. Whether or not it is, no one can say. Justice Clarke's opinion in the *Abrams Case* nowhere directly touches that question; it neither agrees nor disagrees with the view of the First Amendment so cogently put forward in the dissent. The *Abrams Case* may therefore some day be explained as a mere disagreement on the interpretation of the particular facts

[15] "Section 2. Promotion of sedition. *Whoever makes,* displays, writes, prints or *circulates, or knowingly aids or abets the making, displaying,* writing, printing *or circulating of any sign, word,* speech, picture, design, argument *or teaching which advises, advocates, teaches or justifies any act of sedition as hereinbefore defined, or any act which tends to incite sedition as hereinbefore defined, or* organizes or assists or joins in the organization of, or *becomes or remains a member of or affiliated with any society or organization, whether the same be formally organized or not, which has for its object in whole or in part, the advising, advocating, teaching or justifying of any act of sedition* as hereinbefore defined, *or the inciting of sedition* as hereinbefore defined, *shall be deemed guilty of promoting sedition,* and, upon conviction thereof, shall be punished by a fine of not exceeding $10,000, or by imprisonment of not exceeding ten years, or by both fine and imprisonment in the discretion of the court."

[16] It is not intended to intimate by this that this proposed bill or any similar measure is or is not politic at the present time. How far such measures in fact serve the purpose of their enactment depends on the conditions of the day, and of the particular measure, and on the method of their enforcement; whether a given measure is worth its price, considering its means of enforcement and the various occasions it offers for unwise or prejudiced exercise of administrative authority; how far excited speech is a safety-valve and how far a source of explosion; how far the regulation of such matters can better be left to the states—these are questions of legislative policy not immediately connected with the main point here under discussion but which should receive their due attention before the enactment of a speech restriction.

involved. But there is some ground for fear that it will not be so explained. The general tone of the opinion gives such ground. To Justice Clarke the distinction seems merely a technical one that "may perhaps be taken:" between language intended to bring into contempt the *form* of our government—our basic institution of republican, representative government—and language intended to produce like results directed against the President and Congress—a man and a body of men whom a true citizen may, at any given time, in war or out of it, dislike and distrust and feel it his duty to oppose. And the course of decision in the lower federal courts, treating words as criminal for their mere tendencies, even though the tendencies be remote, and finding the requisite criminal intent in the mere use of words having such tendencies, must have been known to the majority of the Supreme Court. They did not declare that under such an interpretation the war measures would be unconstitutional. Yet some hope lies in the fact that they avoided passing on that question.

On certain things, it was submitted at the outset of this paper, all Americans can agree. The minority is to obey; in its efforts to change the law it is to refrain from violence. But it is fundamental to our institutions that a minority shall be free to express itself in words, to be heard in peaceable objection, and in peaceable persuasion. The First Amendment has been thought to secure the minority this privilege. It may be that impression is mistaken. Even so, it is believed to be a policy fraught with heavy danger to impair that privilege. Repression of expression has in the past meant disorder; stern repression, long-continued, has meant revolution.[17] Post-war problems are upon us, neither light nor simple; there is small reason to hope that their full scope and sweep is yet apparent. We shall need, and need sorely, whatever help discussion can bring. Surely we have need to remember with Justice Holmes that "time has upset many fighting faiths;" that the theory of government under our Constitution has been that men should believe "even more than they believe the very foundations of their own conduct that the ultimate

[17] When conditions are favorable, there may be, instead of violent revolution, merely a sudden peaceable displacement of the repressors; as when the old Sedition Act, coupled with its partisan enforcement, joined in 1800 with the split in the Federalist Party to effect the removal of that party from our politics forever. But such favorable conjunction of forces is rare. The final effect of repression must, on thought, be clear to any man. Conditions are not unchanging; growing dissent from any established order is inevitable, increasing as conditions change. To choke off dissent embitters the dissenter without converting him. As dissenting opinion grows, to refuse it opportunity to make itself felt in our political institutions is to progressively estrange those institutions from the human conditions they are supposed to govern, and whose proper government is the condition of their own existence. In the end a readjustment is inevitable, to make the government conform to the governed. If that readjustment is prevented from taking its normal, gradual, constitutional course, it will be forced into a course extra-constitutional and violent.

good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground on which their wishes can safely be carried out."

K. N. L.

GRIST FROM THE LAW MILLS

Indicative of a certain trend[1] of decisions in Equity is *Stark v. Hamilton* (1919, Ga.) 99 S. E. 861, in which the defendant, who had debauched the plaintiff's minor daughter, was restrained from longer associating with or communicating with her. No property right was involved, except the technical right of the father to the services of his minor child, and it was frankly recognized that the real injury lay in the humiliation of the father and the damage to the reputation of the family. The court, however, felt no obstacle either in the absence of precedent or in the novelty of incident, and was content to say that the protection of property should not be placed above similar protection of personal rights. With this statement no one will quarrel. Undoubtedly the dogma, "Equity protects only property rights," must be abandoned;[2] in the past it has been invoked to cover a palpable miscarriage of justice.[3] But as the pendulum swings in the other direction, must we not pause to consider the expediency of the *exercise* of jurisdiction, the *existence* of which may be conceded? That is the real problem in the present case. Unfortunately it received no consideration.[4]

There is much to be said for the distinction sometimes made between artful knaves and guileless fools, even in civil suits where the fool is seeking recovery of the shekels of which he has been mulcted in some illegal game.[5] Certainly the distinction is well taken when the subject of it is a defendant accused of a crime in which intent is a vital factor. In *Crane v. United States* (1919, C. C. A. 9th) 259 Fed. 480, the defendant had been convicted of using the mails in a fraudulent scheme to obtain money. He was the prophet of a new religion; he was the one man who could exorcise (by absent treatments) the thirteen devils who produce human misery; and he could be persuaded to accept pecuniary offerings when that service had been

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[1] *Cf. Vanderbuilt v. Mitchell* (1907, Ct. Err.) 72 N. J. Eq. 910, 67 Atl. 97; *Ex parte Warfield* (1899) 40 Tex. Cr. App. 413, 50 S. W. 933.

[2] *Cf. Pollard v. Photographic Co.* (1888) 40 Ch. D. 345, 354.

[3] *E. g. Hodecker v. Stricker* (1896, Sup. Ct.) 39 N. Y. Supp. 515; *Roberson v. Rochester Folding Box Co.* (1902) 171 N. Y. 538, 64 N. E. 442.

[4] The authorities are collected and carefully examined by Dean Pound in a notable article, Equitable Relief Against Defamation and Injuries to Personality (1916) 29 HARV. L. REV. 640.

[5] See (1919) 27 YALE LAW JOURNAL, 1090.